Office - Supreme Court, U.S.
FILED
JAN 4 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-665

IN THE

Supreme Court of the United States

October Term, 1983

BUFFALO TEACHERS FEDERATION, *et al.*,
Petitioners,

vs.

GEORGE ARTHUR, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

DAVID GERALD JAY, ESQ.
Attorney for Respondents
Suite 100, 120 Delaware Ave.
Buffalo, New York 14202
Tel: (716) 856-6300

THOMAS I. ATKINS, ESQ.
General Counsel, NAACP
186 Remsen Street
Brooklyn, New York 11201

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

Questions Presented

1. In a school desegregation case, can a State Statute which confers teacher seniority be superseded in order to impliment an Affirmative Action portion of the remedy?

2. In a school desegregation case, can the provisions of a collective bargaining agreement be superseded in order to impliment an Affirmative Action portion of the remedy?

3. Does the Second Circuit's decision in this case conflict with its prior holding in *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. denied* 431 U.S. 965 (1977) or the decision of the Sixth Circuit in *Oliver v. Kalamazoo Bd. of Educ.*, 706 F.2d 757 (6th Cir. 1983)?

TABLE OF CONTENTS.

	Page
Questions Presented	i
Table of Authorities	ii
Statement of the Case	1
Argument	5
Point I. Desegregation Requires Integration of Faculty and Staff	5
Point II. The Decision of the Second Circuit Does Not Conflict with *Chance v. Board of Examiners*	9
Point III. The Second Circuit Opinion is Congruent with that Reached by the Sixth Circuit in *Oliver v. Kalamazoo Bd. of Educ.*	11
Conclusion	14
Appendix—Excerpts of District Court's Unreported Decisions of May 23, 1983 and March 26, 1979	A1

TABLE OF AUTHORITIES.

CASES:

Arthur v. Nyquist, 415 F. Supp. 904 (W.D.N.Y. 1976), *aff'd in pertinent part* 573 F.2d 134 (2d Cir.), *cert. denied sub nom. Manch v. Arthur*, 439 U.S. 860 (1978) 2,3,5

Arthur v. Nyquist, No. 1972-325, pp. 2-3 (W.D.N.Y., March 26, 1979) 10

Arthur v. Nyquist, 520 F. Supp. 961 (W.D.N.Y. 1981) 3

Page

Arthur v. Nyquist, No. 1972-325, pp. 1-2, 20 (W.D.N.Y. May 23, 1983) 4,9,13
Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich. 1972), *modified on other grounds* 484 F.2d 215 (6th Cir. 1973) 8
Brown v. Bd. of Educ., 347 U.S. 483 (1954) (*Brown I*) .. 5
Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown II*) . 6
Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), *cert. denied* 431 U.S. 965 (1977) i,9,10
Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*) .. 5
Milliken v. Bradley, 433 U.S. 267 (1977) (*Milliken II*) .. 6
Morgan v. Kerrigan, 530 F.2d 431 (1st Cir.), *cert. denied* 426 U.S. 935 (1976) 7
Morgan v. O'Bryant, 671 F.2d 23 (1st Cir.), *cert. denied* 103 S. Ct. 62 (1982) 7,12
Oliver v. Kalamazoo Bd. of Educ., 706 F.2d 757 (6th Cir. 1983) i,7,9,11,12,13
Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 10,11
Taylor v. Coahoma County School Dist., 330 F. Supp. 174 (N.D. Miss. 1970), *aff'd* 444 F.2d 221 (5th Cir. 1971) 8
United States v. Bd. of Educ. of City of Bessemer, 396 F.2d 44 (5th Cir. 1968) 8
United States v. Greenwood Municipal Separate School Dist., 406 F.2d 1086 (5th Cir.), *cert. denied* 395 U.S. 907 (1969) 8
United States v. Indianola Munic. Sep. School Dist., 410 F.2d 626 (5th Cir.), *cert. denied* 396 U.S. 1011 (1970) 8
United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969) 6
Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981), *cert. denied* 454 U.S. 1124 (1982) 13

Page

STATUTE:

New York Educ. L. Section 2573.10(a) 4

RULES:

Rule 17.1(a) of the Supreme Court Rules..... 11

ARTICLE:

Davidson, Davidson & Howard, *The Riffing of Brown: De-integrating Public School Faculties*, 17 Harv. C.R.-C.L. L. Rev. 443 (1982)..... 6

IN THE

Supreme Court of the United States

October Term, 1983

No. 83-665

BUFFALO TEACHERS FEDERATION, *et al.*,
Petitioners,

vs.

GEORGE ARTHUR, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

The Respondents (Plaintiffs below) oppose the petition for certiorari of the BUFFALO TEACHERS FEDERATION (hereinafter "BTF") on various grounds.

Statement of the Case

This is a school desegregation case in which the Board of Education of the City of Buffalo (hereinafter "Board") and the Members of the Common Council, the legislative arm of the government of the City of Buffalo (hereinafter "City") were found guilty by the District Court of intentional acts of segregation concerning the Buffalo Public School System (hereinafter "BPSS").

In so finding, the District Court observed, as an integral part of its liability decision, that the Board "... purposely followed a policy that has segregated, and was intended to segregate, the teacher and administrative staffs in the Buffalo public schools." *Arthur v. Nyquist*, 415 F. Supp. 904, 946 (W.D.N.Y. 1976), *aff'd in pertinent part* 573 F.2d 134 (2d Cir.), *cert. denied sub nom. Manch v. Arthur*, 439 U.S. 860 (1978).

The Second Circuit Court of Appeals, in reviewing the District Court's liability decision, observed the following:

> "We are unable to imagine a set of facts, short of a public admission of wrongdoing, which would be more suggestive of intentional discrimination."
>
> * * *
>
> "No policy, save segregation itself can consistently explain the pattern of transfers, zoning, optional attendance areas, *staff recruitment and assignment*, and general obstructionism which marks the actions of the City appellants." *Arthur v. Nyquist, supra*, 573 F.2d at 145.

In order to understand the procedural history of this case, and the context in which the issues before this Court have arisen, it is important to keep in mind that the Petitioner BTF entered this case upon their motion for *amicus curiae* status which was granted by the District Court on June 23, 1976, on the heels of the liability decision.

Perhaps the BTF was prodded to action by the Court's prophetic remark:

> "We feel constrained to say that this court's credulity is also taxed by the failure of the Board to increase the minority teacher percentage, in any meaningful amount, in over ten year's time." *Arthur v. Nyquist, supra*, 415 F. Supp. at 948.

On July 9, 1976, the District Court, in reading portions of its April 30, 1976 liability decision, made reference to a portion of that decision which is the touchstone of this aspect of the remedy phase of the case:

> "The proposed plans must encompass the staff segregation as well as the student segregation." *Arthur v. Nyquist, supra*, 415 F. Supp. at 970.

This is a case where from its inception, it was evident that any remedy would include an element to correct staffing inequities, since:

> "It [was] plainly admitted that the Board has purposely followed a policy that has segregated, and was intended to segregate, the teacher and administrative staffs in the Buffalo public schools." *Arthur v. Nyquist, supra*, 415 F. Supp. at 946.

Subsequent to the liability decision, as recounted in the District Court's decision of August 21, 1981 (*Arthur v. Nyquist*, 520 F. Supp. 961, 963 (W.D.N.Y. 1981)), numerous orders concerning staff integration were made in the period 1977-1979, before the court imposed the one-for-one hiring and recall goals upon the Board on March 26, 1979. This action roused the BTF from its slumber to commence this round of litigation.

It must also be kept in mind that although the court fixed 21% as the affirmative action goal, minority representation in the instructional staff has risen only from 8% in 1976, the year of the liability decision, to 14% in 1981.

The following table illustrates the raw data from which the above percentages were derived:

FULLTIME CLASSROOM TEACHERS
MINORITY AND MAJORITY
1976 and 1981*

	Minority		*Majority*	
	1976	*1981*	*1976*	*1981*
Elementary	177	198	1,095	897
Secondary	128	87	1,146	841
Other	79	123	462	733
Totals	384	408	2,703	2,471

It is also clear that the BPSS has never achieved the status of a unitary school system, the vestiges of discrimination having been eliminated, "root and branch". See *Arthur v. Nyquist*, No. 1972-325, pp. 1-2, 20 (W.D.N.Y. May 23, 1983) (Appendix 1).

It is conceded by Respondents that the BTF contract with the Board was negotiated in good faith and without any discriminatory intent. The BTF's Petition also claims that New York Educ. L. Section 2573.10(a) is still relevant. By its terms, that statute applies only to cities having a population in excess of 400,000. As pointed out by the Second Circuit, the viability of that statute is in question, since the 1980 federal census determined that the population of the City of Buffalo is less than 358,000. *Arthur v. Nyquist, supra*, 712 F.2d at 818, n. 1. However, for the purposes of the analysis of these issues in this case, neither of these matters are of relevance.

ARGUMENT

POINT I

Desegregation Requires Integration of Faculty and Staff.

Petitioners claim that the lower courts went too far in superseding both a state tenure statute and the contractual rights granted teachers under a collective bargaining agreement. The courts below did nothing other than carefully tailor the remedy to the scope of the violation. *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) (*Milliken I*). The courts were confronted with a system in which the prospects of increasing minority participation in faculty and staff had languished for ten years prior to the liability finding. See *Arthur v. Nyquist*, *supra*, 415 F. Supp. at 948.

Additionally, since the liability determination, through the year 1981, minority staff had increased to only 14% of the entire staff. The court merely implimented the policies of this court and other circuit courts of appeal in devising an effective remedy on behalf of the children, the true "victims" under the law and the facts of this case. Petitioners' attempts to cloud this fact by their assertion that majority teachers were in some way "victims" is not substantiated in the record. As this court has noted:

> "Today, education is perhaps the most important function of state and local governments .... Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (*Brown I*).

What better way is there to instill these qualities in the children than by having them see democracy in

action in the schoolhouse. See, *e.g.*, Davidson, Davidson & Howard, *The Riffing of Brown: De-integrating Public School Faculties*, 17 Harv. C.R.-C.L. L. Rev. 443 (1982).

Recognizing that desegregation of public schools encompasses many more elements than simple desegregation of student population, this court indicated in 1955 that: "... the courts may consider problems related to administration, ... personnel, ... and revision of local laws and regulations which may be necessary in solving the foregoing problems." *Brown v. Bd. of Educ.*, 349 U.S. 294, 300-01 (1955) (*Brown II*).

The problems raised by the issue of faculty and staff segregation have found their way to this court on many occasions:

> "The dispute ... deals with faculty and staff desegregation, a goal that we have recognized to be an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 231-32 (1969).

More recently, this court has re-affirmed the principle that a school desegregation remedy should be all-encompassing:

> "Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures." *Milliken v. Bradley*, 433 U.S. 267, 287-88 (1977) (*Milliken II*).

Petitioners in this case contend that the court's affirmative action plan was not necessary to eliminate the longstanding faculty segregation. This contention flies in the face of decisions of other courts which have dealt with this issue:

> "An integrated faculty and staff is also necessary to bring black students and their parents fully into the school community and decision-making processes, and to counteract their past isolation." *Morgan v. O'Bryant*, 671 F.2d 23, 27 (1st Cir.) *cert. denied* 103 S.Ct. 62 (1982).

The Sixth Circuit case advanced by petitioners as a reason why this court should grant certiorari does not question the court's authority to order remediation of staff segregation:

> "Of course, the district court has the power to order those remedies required to vindicate the students' constitutional rights." *Oliver v. Kalamazoo Bd. of Educ.*, 706 F.2d 757, 763 (6th Cir. 1983).

The sole issue in *Oliver* was whether the remedy owed on that record was "necessary" rather than simply "reasonable."

It is further contended by petitioners that the state tenure statute and the collective bargaining agreement provisions are in some way sacrosanct and cannot be altered in any way by a court of equity in the remedy phase of a school desegregation case. This argument has been advanced and answered previously:

> "This argument fundamentally misapprehends the nature of this case. The plaintiffs are not the black teachers or would-be teachers who have been discriminated against because of their race. The district court's examination of the School Committee's ... policies was undertaken to determine whether those policies violated the rights of black Boston public school children. It is the rights of those children that the order in issue is intended to protect." *Morgan v. Kerrigan*, 530 F. 2d 431, 432 (1st Cir.) *cert. denied*, 426 U.S. 935 (1976).

Additionally, there is ample precedent in school desegregation cases to limit the effect of state statutes which might conflict with federal court decrees:

> "[We] are emphatic that the school board could not use local tenure or teacher hiring-security statutes as a justification for failing to initiate and maintain desegregation of faculties. Any such result would empower a State, opposing the principles of a valid Federal Court decree, to override it through collateral legislation." *United States v. Bd. of Educ. of City of Bessemer,* 396 F.2d 44, 51 (5th Cir. 1968). See also *Taylor v. Coahoma County School Dist.,* 330 F.Supp. 174, 176 (N.D. Miss. 1970), *aff'd* 444 F.2d 221 (5th Cir. 1971); *United States v. Greenwood Municipal Separate School Dist.,* 406 F.2d 1086, 1094 (5th Cir.), *cert. den.* 395 U.S. 907 (1969); *United States v. Indianola Munic. Sep. School Dist.,* 410 F.2d 626 (5th Cir.), *cert. den.* 396 U.S. 1011 (1970).

Petitioner BTF further claims that their collective bargaining agreement, entered into without discriminatory intent, should bind the parties to this action. This argument has been advanced and rejected previously. In the Detroit desegregation case, for example, the court held:

> "... no contract, union agreement, or otherwise may impede these Fourteenth Amendment obligations [to insure faculty desegregation]." *Bradley v. Milliken,* 345 F.Supp. 914, 939 (E.D. Mich. 1972), *modified on other grounds,* 484 F.2d 215 (6th Cir. 1973).

Since it is clear that the remedies approved by the Circuit Court of Appeals are within the power of the courts, and the record in this case demonstrates that since the liability finding there has been consistent progress leading toward staff and faculty integration as part of a greater desegregation remedy, and since neither

state tenure statutes nor contractual obligations are absolute bars to the remedies awarded below, the only viable argument of the petitioners is that the remedy was not "necessary" under the formulation found in the Sixth Circuit case, *Oliver v. Kalamazoo Bd. of Educ., supra.*

Buffalo has never achieved unitary status, so the continuation of the remedy process is indeed necessary. See *Arthur v. Nyquist,* No. 1972-325, pp. 1-2, 20 (W.D.N.Y. May 23, 1983) (Appendix 1).

POINT II

The Decision of the Second Circuit Does Not Conflict with *Chance v. Board of Examiners.*

It is contended by petitioners that the Second Circuit reversed a position that it took in *Chance v. Board of Examiners,* 534 F.2d 993 (2d Cir. 1976), *cert. denied,* 431 U.S. 965 (1977).

Petitioners concede that *Chance* was a case more akin to a Title VII employment discrimination case, rather than a school desegregation case, however, petitioners advance a most startling proposition in their brief:

> "The fact that the proceeding here is part of a school desegregation case is irrelevant without a finding on the record indicating some compelling reasons for the order from the perspective of the minority school children. Nothing in the record justifies such a finding." Petitioners' Petition for Writ of Certiorari at 11-12.

The record is replete with findings that minority children require an education free from the evils of intentional segregative acts. Even if it were not, petitioners never raised such an argument in the Second Circuit and

cannot now be heard to claim the record is incomplete in that respect. As the court below found, there was never any disagreement between any of the parties that an affirmative action plan of some sort had to be adopted to remedy the effects of discrimination in staffing and assignment of teachers. See *Arthur v. Nyquist*, 1972-325, Order of March 26, 1979, p. 2 (Appendix 1).

Moreover, *Chance* "... involved a layoff remedy adopted solely in the context of employment discrimination." *Arthur v. Nyquist, supra*, 712 F.2d at 822.

Why should the reasoning in a Title VII or Section 1981 case not apply to the remedy phase of a school desegregation case? Presumably adult employees are more able to protect their interests than school children whose public school education has been undermined by adults who have practiced invidious, intentional discrimination against them. In the balancing of the interests to be protected, surely the children are more "innocent" or "victims" than teachers who have benefitted from the acts of discrimination perpetrated in the past. *Chance*, therefore, is no bar to the remedy awarded the children in this case.

The distinction between Title VII cases and school desegregation cases was made by this court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In that case this court dismissed claims that school desegregation cases were controlling in cases litigated under Title VI; and conversely, cases litigated under Title VI and VII cannot be controlling in cases litigated under the Fourteenth Amendment:

> "The school desegregation cases are inapposite. Each involved remedies for clearly determined constitutional violations. Racial classifications thus

were designed as remedies for the vindication of the constitutional entitlement. Moreover, the scope of the remedies was not permitted to exceed the extent of the violations. Here, there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification." *Regents of University of California v. Bakke, supra*, 438 U.S. at 300-01 (citations omitted).

POINT III

The Second Circuit Opinion is Congruent with that Reached by the Sixth Circuit in *Oliver v. Kalamazoo Bd. of Educ.*

Petitioners claim that the Sixth Circuit's recent decision in *Oliver v. Kalamazoo Bd. of Educ.*, 706 F.2d 757 (6th Cir. 1983) is in conflict with the decision of the Second Circuit in the case at bar. While both cases concern layoffs and recall rights of majority teachers in the context of a school desegregation remedy phase, the same legal principles are utilized in both cases. There is nothing inconsistent with either holding which might trigger a review of this material by this court. See Rule 17.1(a).

The Sixth Circuit related findings by the district court specifically enumerating the number of persons who would be affected by an order which superseded the tenure statute and collective bargaining agreement provisions. *Oliver v. Kalamazoo Bd. of Educ., supra*, 706 F.2d at 760.

In the case at bar, there is nothing in the record to substantiate from a factual point of view any of the dire predictions raised by the BTF. It must be remembered that the BTF's initial application which was removed to the federal court and joined with this case concerned only the plight of temporary teachers who had not been offered probationary appointments.

The Sixth Circuit, agreeing with both the Second and the First, (*Morgan v. O'Bryant*, 671 F.2d 23 (1st Cir.), *cert. denied*, 103 S.Ct. 62 (1982)), observes:

> "Clearly, the remedy may extend to the composition and assignment of the teaching staff." *Oliver v. Kalamazoo Bd. of Educ., supra*, 706 F.2d at 761.

The Sixth Circuit, in rejecting the district court's order, simply observed that the district court had gone too far in its application of this principle.

In the case at bar, Judge Curtin approved a temporary goal for the hiring of minority teachers. His one-for-one quota, although challenged by the BTF in the Second Circuit across the board, is challenged in the petition only as it affects layoffs. Once again, *Kalamazoo* is cited by petitioners as disapproving this temporary, stop-gap measure. However, the court in *Kalamazoo* observed:

> "We do not hold that racial hiring quotas for the teaching staff are *per se* improper to remedy a violation of the students' constitutional rights even where there has been no discrimination in the hiring of teachers. The violation may be sufficiently egregious to warrant a temporary teacher hiring quota at the time of the determination of the constitutional violation *vis-a-vis* the students." *Oliver v. Kalamazoo Bd. of Educ., supra*, 706 F.2d at 763.

That is exactly what happened in the case at bar. Judge Curtin's "quota" was just that: a temporary measure designed to address the students' constitutional rights until such time as the teacher population in the schools reflects that of the city-wide minority population. This is to be contrasted with the "quota" utilized in *Kalamazoo* where the district court based the percentage figure for minority teachers on the student population in

the total school system, rather than on the entire minority population of the city. Since Buffalo has not as yet achieved a unitary school system (see *Arthur v. Nyquist*, 1972-325, Order of May 23, 1983, pp. 1-2, 20 [Appendix 1]) this temporary remedy should be permitted to continue until it is no longer needed.

The plan approved by the Second Circuit is a classic example of affirmative action in the school desegregation area:

> "A race-conscious affirmative action program is substantially related to remedying past discrimination if . . . the plan endures only so long as is reasonably necessary to achieve its legitimate goals . . . ." *Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1982).

It is the temporary and clearly-defined nature of this plan which makes it possible to abridge the statutorily reserved tenure rights of majority teachers as well as their expectancies based upon provisions of collective bargaining agreements.

Finally, petitioners contend that the Second Circuit applied a different standard than did the Sixth Circuit in its determinations as to whether the remedy afforded the children was appropriate under the circumstances. The Sixth Circuit found that the appropriate standard to be used was one of "necessity." *Oliver v. Kalamazoo Bd. of Educ., supra*, 706 F.2d at 763-64.

The Second Circuit adopted the same standard:

> "In particular, when a district court is shaping relief that will infringe upon seniority rights, the court must take care that the relief is *necessary* to correct constitutional violations." *Arthur v. Nyquist, supra*, 712 F.2d at 822 (emphasis supplied).

Conclusion

The petition for certiorari should be denied.

Dated: Buffalo, New York
December 28, 1983

DAVID GERALD JAY, ESQ.
Attorney for Respondents
Suite 100, 120 Delaware Ave.
Buffalo, New York 14202
Tel: (716) 856-6300

THOMAS I. ATKINS, ESQ.
General Counsel, NAACP
186 Remsen Street
Brooklyn, New York 11201

APPENDIX

Excerpts of District Court's Unreported Decisions of May 23, 1983 and March 26, 1979.

Arthur v. Nyquist, No. 1972-325, pp. 1-2, 20
(W.D.N.Y. May 23, 1983)

Pages 1-2

* * *

"This determination does not mean that the defendants' important work of continuing the desegregation process and improving the quality of education in the Buffalo Public Schools is completed. Nor does it mean that the final chapter in all aspects of this case has been written. Yet it does mark an important point on the path to achieving a fully integrated and unitary school system, and a system in which all the citizens of Buffalo may take pride."

* * *

Page 20

* * *

"Although the Board has successfully overcome the presumption of discriminatory student assignments concerning these three schools, more is required before the court may conclude that a school system has eradicated the last vestiges of segregation and achieved unitary status. Faculty, staff, transportation, extracurricular activities, and facilities are also among the most important indicia of racially identified school . . . ."

* * *

Appendix—Excerpts of District Court's Unreported Decisions of May 23, 1983 and March 26, 1979.

Arthur v. Nyquist, No. 1972-325, pp. 2-3
(W.D.N.Y., March 26, 1979)

* * *

This court had the power to impose an affirmative action remedy at the outset of the remedy phase of this case, and the defendants have never challenged this power. From the beginning, the defendants have recognized their obligation to devise an affirmative action plan. I therefore gave them a number of opportunities to carry out their responsibilities, believing that the public interest in the long run would best be served without judicial interference.

After almost three years of delay, it has become clear that the design and implimentation of an affirmative action plan cannot be left entirely to the defendants. I am therefore directing the defendants to design and impliment an affirmative action plan in accordance with the general guidelines set forth below."

* * *